United Nations AT/DEC/1150

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1150

Case No. 1259: SY

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, President; Mr. Omer Yousif Bireedo; Mr. Spyridon Flogaitis;

Whereas, on 29 May 2002, Fatima Sy, a former staff member of the United Nations, filed an Application, requesting the Tribunal, inter alia:

"9. ... to order:

(f) that the Applicant should be reinstated with full benefits and back pay in an appropriate P-4 post in the Secretariat in New York;

(g) that the Applicant should be given a permanent contract;

(h) that the Applicant should be appropriately compensated for violation of due process;

(i) or, failing reinstatement, that payment be made to the Applicant of a compensation of no less than two years net base salary."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 18 November 2002 and twice thereafter until 10 December 2002;

Whereas the Respondent filed his Answer on 26 November 2002;

Whereas the Applicant filed Written Observations on 17 February 2003, and, on 4 April 2003, the Respondent commented thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on a two-year fixed-term appointment, as an Associate Auditor, at the P-2, step one level, in the Internal Audit Division, Department for Administration and Management, on 28 September 1988. On 24 September 1990, she was reassigned within the Department as an Associate Administrative Officer to the Commercial, Purchase and Transportation Service. Effective 1 July 1992, she was promoted to P-3, and her functional title was changed to Administrative Officer. On 1 August 1994, she was transferred to the Department for Peacekeeping Operations (DPKO) where her functional title was changed to Finance Officer, and, on 1 October 1995, to the Executive Office, Department for Development Support and Management Services (DDSMS) where, effective, May 1996, she was promoted to P-4 and her functional title changed to Budget Officer.

Following the merger of DDSMS into the Department of Economic and Social Affairs (DESA), the Applicant was assigned as Procurement Officer to the Procurement Division, Office of Central Support Services (OCSS), effective 8 September 1998, and her fixed-term appointment was extended to 31 December 2000. The Applicant's appointment expired on 12 January 2001, but she was reappointed on 13 January as Budget Officer with the United Nations Organization Mission in the Democratic Republic of Congo (MONUC), Kinshasa, until 30 June 2001. Her appointment was extended several times, the last extension to expire on 31 December 2003.

Her performance was rated "excellent" throughout, and she was recommended several times between 1992 and 1995 for consideration for conversion to permanent appointment. On 29 March 1995, the Under-Secretary-General for Peace-Keeping Operations wrote to the Assistant Secretary-General for Human Resources Management, forwarding a memorandum from the Applicant, stating that he endorsed her claim, which he considered well-founded, and urging that her request for probationary appointment be favourably considered. On 10 April 1995, the Office of Human Resources Management (OHRM), replied that, as the Applicant did not meet the requirement of being employed on an established post, OHRM was not in a position to favourably consider the recommendation that she be granted a career appointment. On 19 June 1996, the Executive Officer, DDSMS, again strongly endorsed the case for granting the Applicant a permanent appointment. However, on 29 September 1996, OHRM reminded the Executive Officer of the continuing freeze

on conversion of staff on fixed-term appointments to career appointments, as announced in ST/SGB/280 dated 9 November 1995, assuring her that as soon as the freeze on conversion was lifted, OHRM would "make every effort to review [the Applicant's] case for conversion directly from fixed-term to permanent appointment as quickly as possible".

Effective 8 September 1998, following the absorption of DDSMS in the newly created Department for Economic and Social Affairs (DESA), the Applicant was redeployed to the Procurement Division. On 17 January 2000, the Assistant-Secretary-General, OCSS, was advised that the financing of the post to which the Applicant was assigned could only be assured through 31 December 2000. On 24 November 2000, the Department of Management, advised OHRM that efforts would be made to place the Applicant in the Programme Planning and Budget Division if they would be able to provide temporary funding for a further period of time in order to retain the Applicant as a staff member. Absent any other means of extending her contract, her appointment would not be extended beyond 31 December 2000.

On 13 December 2000, the Applicant was informed that efforts to find a suitable placement for her had not been successful and that, accordingly, her appointment would not be extended beyond 12 January 2001.

On 16 December 2000, the Applicant addressed a request for administrative review to the Secretary-General.

On the same day, she wrote to the Secretary, Joint Appeals Board (JAB), requesting suspension of action of the decision not to renew her appointment. On 21 December 2000, the JAB held a summary hearing. Although it did not recommend suspension of action, it did recommend that the appeal be dealt with on an expedited basis. This recommendation was endorsed by the Under-Secretary-General for Management on behalf of the Secretary-General and communicated to the Applicant in his memorandum of 29 December 2000.

The JAB submitted its report on the merits on 8 January 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
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> 18. Having noted that Appellant had encountered a series of unfortunate circumstances in the course of her service ... the Panel nevertheless considered that her problems were primarily due to what can only be characterized as a lack of due diligence on the part of the Administration. Two separate aspects of this case were the basis for this conclusion.

19. The first of these was the question of consideration for career appointment. On several occasions, officials of OHRM implicitly or explicitly informed one or the other of the departments recommending her conversion that her case would be considered when that office got around to it. ... Nothing in Respondent's reply or Appellant's [Officinal Status] file reflects any action taken by OHRM to consider granting a career appointment to a candidate described by the Secretary-General (...) as a 'deserving young staff member'. After a review of Appellant's [performance evaluation reports] the Panel can only echo his evaluation.

20. ... the UNAT '[has] held . . . that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the administration to prove such consideration was given'. Respondent has failed to offer any such proof.

21. The second aspect concerned the efforts made by the Administration to find alternate placement for Appellant as from 1 January 2001. ... [N]early ten months elapsed between [the] warning that financing of Appellant's temporary post would end as of 31 December 2000 and any effort by OCSS to seek placement for her outside the Procurement Division ...

22. ... [T]he Panel considered that Appellant's more than twelve years of better than satisfactory service called for responsible action on the part of the Administration. The Panel concluded ... that 'Respondent has been negligent as an employer in failing to extend to the [Appellant] fair and proper treatment ...'

...

Recommendation

25. The Panel recommends to the Secretary-General that, as soon as possible, Appellant be given every reasonable – and the Panel would devoutly hope, favourable – consideration for a permanent appointment."

On 27 March 2002, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General is not in agreement with the Board that there was inaction or negligence on the part of the Administration in respect of considering you for a permanent appointment, or in respect of finding alternate placement for you. It was indeed unfortunate that most recommendations for considering you for career appointment were made when the then applicable guidelines required the availability of a regular post for such consideration, and/or after the freeze on conversion of fixed-term appointments came into affect in November 1995. However, that fact that you did not have a career appointment was not the reason that you were in need of placement during the redeployment exercise, as is made clear by the fact that other staff with permanent appointments were put on the redeployment list. On the issue of finding alternate placement, the Secretary-General has been advised that, after it became clear that you could no longer be retained in the Procurement Division, numerous efforts were made to identify suitable posts for you elsewhere, which were regrettably unsuccessful. As regards the Board's recommendation, the Secretary-General cannot accept it as it is not

implementable: first, staff on 300 Series appointments cannot be considered for career appointment; second, since 1995, consideration for career appointment has been limited to staff on probationary appointments and those who were recruited through competitive examinations. However, your status gives you the right to apply to, and be considered for, any internal vacancies within the Secretariat as an internal candidate."

On 29 May 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's fixed-term contract constituted a de-facto disciplinary measure, in violation of her rights for due process.

2. The decision not to renew the Applicant's fixed-term contract was motivated by animus.

3. The Applicant's right for reasonable consideration for permanent appointment has not been respected.

4. The Applicant's right for fair consideration for renewal of fixed-term contract has not been respected.

5. The Applicant's non-renewal of fixed-term contract was part of a pattern of discrimination against black women in the Applicant's division.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right, nor the legal expectancy of continued employment with the Secretariat at Headquarters. No one has a right to serve in any specific post and in any particular duty station.

2. The Applicant had no right to conversion of contract. Her claims regarding conversion of contract are time-barred.

3. The contested decision and actions were not prompted by discrimination, improper motivations or extraneous factors. The Applicant's allegations of discrimination based on maternity leave, pregnancy related absence, race, and sex, are without foundation.

4. The decision not to renew the Applicant's contract with OCSS at Headquarters did not constitute a disguised disciplinary action.

The Tribunal, having deliberated from 29 October to 17 November 2003, now pronounces the following Judgement:

I. This case revolves around two issues. The first issue refers to whether or not the Administration was wrong by not giving the Applicant "every reasonable consideration" for a permanent post in response to the Applicant's request, supported by her superiors, to be considered for a probationary appointment and then directly for a permanent post. The second, whether the Administration was sufficiently diligent in attempting to place her in a post equivalent to the one she held when she was subject to redeployment because DDSMS, where she worked, was merged with DESA in 1998 and a number of posts were consequently abolished.

II. With regard to the first issue, it is obvious that in normal conditions the Applicant would have been entitled to be considered in good faith for a permanent post, since she had very favourable recommendations. Obviously, she was only entitled to consideration, however, since the granting of this type of post is at the discretion of the Administration, provided there is no discrimination, arbitrariness or another improper motivation. The *onus* probandi, of course, falls on the Applicant.

III. The Tribunal notes that as early as August 1992, the Chief, Commercial, Purchase and Transportation Service, noting the Applicant's "outstanding" performance, had recommended that her contract be converted to probationary. This recommendation was not followed up because, at the time, the Applicant had not yet served for five years with the Organization. Subsequent recommendations to grant her a probationary appointment, in October 1994 and in March 1995, were rejected on the grounds that she could not be considered a "pipeline" case (the usual probationary period be waived and she be converted directly from fixed-term to permanent), as she was recommended after 12 March 1992, and on the grounds that she did not meet the condition of availability of a regular post, respectively. Thus, while the Tribunal is sympathetic to the Applicant's plight, it is satisfied that the Applicant's appointment was not converted for technical reasons, and not due to a lack of action on the part of the Administration.

IV. The Tribunal is satisfied, moreover, that the holding of a permanent post would not necessarily have saved her from the vicissitudes that resulted from her inclusion in the redeployment exercise, as the Respondent observes, since staff members with permanent posts were included in the redeployment as well.

V. As for the Administration's alleged negligence in providing her with a post that was equivalent to the one she held, the important fact is that the Applicant continued in the service of the Organization, on a fixed-term appointment, except that her new post was in Kinshasa instead of at Headquarters, which she preferred. But staff members must be open to being placed at other duty stations, since the Secretary-General is authorized to assign them wherever they are needed, under staff regulation 1.2 (c): "Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations".

VI. The Applicant claims, however, that the Administration had not renewed her contract in January 2002, and that she was actually the one who obtained the post in the Democratic Republic of Congo through her own efforts. Moreover, there was no continuity between the previous post and her current contract with the United Nations, valid until December 2003. In support of this claim, she points out that the former was at the P-4, step 6 level, and the latter is at step 1, and that the former post had international benefits, while the latter does not.

VII. With respect to her first argument, it must be said that, whether or not she obtained her current post through her own efforts, the post is a United Nations post, no matter how she obtained it, and therefore it was ultimately granted to her by the Administration. The United Nations is a single entity, and even assuming that there was some negligence or lack of good faith by some part of the Administration, in granting the Applicant a new post, other parts of the Administration corrected the situation, and therefore it can be said that it was the Administration itself which made amends. A new contract was granted when the earlier one expired, and it was the Administration which ultimately granted it to her.

VIII. The second issue raised by the Applicant is that there was no continuity between the two posts. However, no rule exists which requires the Administration when granting a new fixed-term contract to ensure that it has the same characteristics as that of the earlier contract, particularly where a state of necessity exists which obliges the Administration to propose, and the Applicant to accept, a less attractive post than the former one. The Tribunal does not consider that negligence or bad faith on the part of the Administration has been proved, and moreover the record bears witness to the efforts made by OHRM to place her in the Internal Auditing Division of the Office of Internal Oversight Services, the United Nations Office for Project

Services and the Department of Peacekeeping Operations; the contacts maintained by OHRM with the executive offices of all departments and offices at United Nations Headquarters; and, the efforts made in coordination with the Office of the Special Adviser on Gender Issues and Advancement of Women. In addition, from September to December 2000, the Applicant applied for a number of posts, according to the Executive Officer, Department for Administration and Management: a P-4 post as Administrative Officer in the Office of the Assistant Secretary-General, OCSS, in September 2000; as Finance Officer in the Commercial Activities Service, OCSS, in October 2000; a P-5 post in the Procurement Division, in November 2000; and another at the same level in the Office of Programme Planning, Budget and Accounts, in December 2000. She was called in for an interview for at least one of these posts.

In the Procurement Office there were, during the time in which the Applicant was redeployed, two vacant P-4 posts. The one that the Applicant claims should have "routinely" been granted to her was available on 16 February 2001. The Assistant Secretary-General, OCSS, had concluded, however, based on the operational needs of Procurement and the Security and Safety service, that a swap of a P-4 post from Procurement in exchange for a P-3 from Security was necessary, which was implemented in due time. The other P-4 post which was available at the end of April 2002, required specialized knowledge regarding the shipping aspects of procurement (ship chartering or freight forwarding) that exceeded the normal functions of a generic procurement officer. In any case, the Applicant did not apply for it in spite of having being advertised on May, 2001.

IX. It must be born in mind that the priority enjoyed by staff-members in the position of the Applicant is only relative, and must give way whenever considerations regarding the best qualified applicant for a vacant post enter into play. The Tribunal recalls its jurisprudence in Judgement No. 971, *Stepanenko* (2000), para. V:

> "With regard to the meaning to be attributed to the phrase 'be given priority consideration', the Tribunal emphasizes that its decision cannot be interpreted as running counter to the principle that staff members in the same situation must be treated equally, a principle which governs the management of the international civil service. It follows that in using that phrase, the Tribunal did not intend to order the automatic reinstatement and promotion of the Applicant in whose favour the judgement was rendered. According to the Applicant's line of reasoning, the Tribunal would substitute its judgement for that of the Administration in matters of promotion and appointment, fields in which the Respondent possesses wide discretion. Furthermore, the concern to provide the Organization with staff meeting the highest standards of efficiency,

competency and integrity in accordance with Article 101 of the Charter, which has often been reflected in the decisions of the Tribunal (Judgement No. 385, *Sobel* (1987)), prevents this phrase from being interpreted too restrictively. Consequently, the Tribunal interprets the phrase 'be given priority consideration' as follows: When considering candidacies for the vacant post for which the Applicant is qualified, the Administration must give priority consideration to the candidacy of the Applicant, but that does not preclude consideration of other candidates for the same post. However, if the Applicant has the same qualifications as another candidate, preference shall be given to the Applicant."

X Finally, the Tribunal must examine the Applicant's claim that discrimination and animosity was used against her. The Tribunal notes that this accusation involved only one Director, and that it has not been proven. While various offices and departments were involved in the Applicant's situation, none of these appeared guilty of animosity or discrimination. The Applicant cannot support her allegation of animosity by referring to her "interpersonal difficulties", as the Applicant herself was aware of these difficulties and even made a "concerted effort to address those problems through personal development courses", according to notes made by the Special Adviser on Gender Issues and Advancement of Women and by the Executive Officer, Department of Management.

XI. In view of the foregoing, the Application is rejected in its entirety.

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Spyridon **Flogaitis**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary